against the landlord be reported at all. Rule 1.65 limits the obligation to report civil litigation involving permittees to litigation involving certain classes of wrongdoing by the permittee such as antitrust and criminal misconduct. Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd. 3252 (1990).

C. Rainbow had no Motive to Deceive the Commission.

40. The record evidence does not support the Staff's view (Findings, page 67) that Rainbow had a motive to deceive the Commission regarding the nature of the tower suit because it could not otherwise justify an extension of time. The record demonstrates that Rainbow believed and had every reason to believe that it did not have to justify an extension because it had not yet been afforded the 24 months to construct to which it was entitled. Rainbow's own understanding of that entitlement had been confirmed by Gordon Oppenheimer of the Commission's staff in 1988 and was reconfirmed in the reasoning of the Mass Media Bureau in 1993 (Joint Exhibit No. 9) and the Commission in 1994 (Joint Exhibit No. 10).

41. The fact that the Commission does not require permittees to justify their construction status before expiration of the as of right period is reflected in the 1985 amendment of Rule 73.3598 to extend the initial construction period for television permittees to 24 months and to eliminate the prior requirement of permittee progress reports during the period. Report and Order: Amendment of Section 73.3598, 102 FCC 2d 1054, 1057 n.8 (1985). And the fact that the Commission does not count time consumed by court appeals and during subsequent lapses in permits against permittees for purposes of calculating their time to construct is equally clear: As a matter of controlling Commission policy, the pendency of a judicial appeal "excuses . . . failure to proceed" with construction, In re KWQJ(FM), 10 FCC Rcd. 8774, 8775, 1 Com.

Reg. 46, 49 (1995); Community Service Broadcasting, Inc., 8 FCC Rcd. 5044, 73 RR 2d 973 (1993); and a permittee may likewise not be faulted for nonconstruction after the lapse of a construction permit, as the Commission made clear in setting this case for hearing, Designation Order, paragraph 3.

42. While the Court of Appeals subsequently adopted a wholly different view of the Commission's rules from that consistently held by the Commission and understood by Rainbow, that subsequent view could not have motivated Rainbow, because the permittee had no inkling what the court would do in 1995 when it filed its extension requests in 1991. What the record unequivocally establishes is that it was at all relevant times Rainbow's belief, based on its understanding of Commission policy and practice and the affirmative assurances of Gordon Oppenheimer, that it was entitled to a full two year construction period with an assured construction permit-- i.e., one which was neither still in appellate litigation, as Rainbow's was until August 1990, or lapsed and under challenge at the Commission, as Rainbow's was between January 1991 and July 1993.

43. Thus, in filing extension requests every six months, Rainbow was not attempting to persuade the Commission that it met the criteria for extensions after the expiration of the initial construction period. Rather, it understood, and it believed the Commission understood, that Rainbow was still within the initial "as of right" construction period during which its decisions about how to use the two year time allocation were entirely a matter of permittee discretion. Joint Exhibit No. 10, para. 38.

44. Accordingly, the exhibits accompanying Rainbow's various extension requests, including the fifth and sixth requests at issue here, did not attempt to advance reasons why

Rainbow was entitled to extra time under the rules governing discretionary extensions after expiration of the two year entitlement period; they simply explained the permittee's status and its current thinking, at the time of each such extension request, on its construction progress within the 24 month as of right period. Rainbow can not be held to have intentionally deceived the Commission to support its fifth and sixth extension requests when the evidence is clear that Rainbow did not even know it had to justify an extension. Rainbow sought extension as a pro forma matter and opposing counsel's formulation, with the benefit of hindsight, of a complicated conspiracy to deceive the Commission, defies both law and logic.

D. The Staff's Challenge to the Merit and Propriety of the Tower Suit is Impermissible.

45. The Staff's notion that Rainbow should be faulted for instituting suit to protect its contractual rights is without precedent. Contrary to the Staff's suggestion (Findings, page 35), the Commission does not require its permittees to abandon their contractual rights if there is a contractual dispute. In Contemporary Communications, 11 FCC Rcd. 5230, 5231 (1996), the Commission, while faulting the applicant for delay, recognized the legitimacy of a dispute with the tower landlord as the basis for an extension of time to construct under Rule 73.3534(b). Here, Rainbow did not delay; it instituted legal action expeditiously after discovering that the landlord intended to breach the lease.

46. That the suit was a meritorious one is beyond question. See footnote 9, supra. In an apparent effort to establish otherwise, the Staff (Findings, page 35) makes an untimely request for official notice of certain findings and conclusions from Judge Marcus' preliminary injunction decision. Official Notice is inappropriate for several reasons: the facts and conclusions contained

in the decision are not, as required by Section 201 of the Federal Rules of Evidence, facts generally known or capable of accurate or ready determination; they are by their very nature not even finally adjudicated facts, but only preliminary findings of a court involving different questions from those at issue before the Commission; and they are facts and conclusions which the court itself found (Rainbow Exhibit No. 11 (rejected)) to be preliminary, nondispositive and made prior to trial. For each of these reasons, the Staff's official notice request must be denied.

47. Issue No. 3 involves the narrow question whether Rainbow deceived or sought to deceive the Commission about the nature of the tower litigation. The evidence clearly establishes that Rainbow accurately reported the fact of the litigation to the Commission and that the tower suit did indeed preclude construction for the period of time from November 1990 to June 1991.

V. EXTENSION OF TIME/WAIVER ISSUE

48. This issue seeks "to determine whether there is any factual basis to support either a grant of a waiver of Section 73.3598 or a grant of an extension request based on the hardship provision of Section 73.3534." Designation Order, paragraph 8. The Staff and Press both take the position that adverse resolution of this issue follows necessarily from the fact that Rainbow was legally free to build its station at any time after finality of the licensing proceeding at the agency level and the ruling of the Court of Appeals that under the plain language of Rule 73.3598, the initial construction period ends two calendar years after issuance of the initial construction permit. The Staff actually states (Findings, page 75) that given the Court's reading

of the rule, it is the "law of the case" that Rainbow was not entitled to two years free and clear but rather "had to construct" while its license was in dispute. Findings, page 75.[11]

49. However loosely the Court of Appeals may have written its opinion, it does not permit that reading: formulation and application of licensing policy are committed by law to agency discretion and beyond the Court's jurisdiction, which is limited to reviewing the Commission's judgments to determine that they are lawful and reasonable. And in designating this issue for hearing the Commission made it very clear that notwithstanding the Court's literal reading of Rule 73.3598, the Staff's "two years and out" theory of construction is not the law of this or any case, and that there is to be no deviation here or in any case from the agency's policy that all permittees are entitled to a two year construction period during which their permits are neither in appellate litigation nor lapsed pending consideration of extension requests by the agency.

50. Thus at the outset, it is clear that time spent in appellate litigation constitutes "reasons beyond the control of the permittee" for purposes of Rule 73.3534(b) and may not be counted against any permittee, In re KWQJ(FM), supra, 1 Com. Reg. 46, 49. Likewise, the Designation Order made clear that any construction Rainbow did or did not undertake outside of

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11 Indeed, the Staff goes so far as to suggest that Rainbow's eligibility for a waiver was questionable even while the licensing proceeding was still pending in appeal, by contending that it only "might" have had cause for waiver during that period. Findings, page 77. And in a piece of Monday morning quarterbacking as mean spirited as it is illogical, the Staff also suggests (Findings, page 75) that since, after surviving years of delay occasioned by agency inaction, Rainbow ultimately managed to construct its station in 7-1/2 months, that established the outer limits of the time to which it was entitled in the first place, thus leaving no reason to give it the same 24 month construction period allowed every other applicant as a matter of right. The practical effect of this reasoning is that the Staff would now have the A.L.J. take away Rainbow's construction permit because it built its station too **fast**.

a period when it held a valid construction permit is simply "not germane." Designation Order, paragraph 4. "[W]e neither accord applicants credit, nor sanction them, for the adequacy or inadequacy of any construction efforts that occur during this [lapsed permit] period." Id. The only time periods which may be considered in determining how much time a permittee has used and whether it is entitled to extension are those periods, subsequent to completion of judicial review, during which it has an unexpired construction permit. Ibid., at paragraph 3.

51. The Designation Order explains that this policy is based on two desiderata: first, the Commission wishes to "discourage applicants from attempting to rely" on efforts made after lapse of a construction permit "as a means to persuade the Commission to grant extension requests," Designation Order, paragraph 4; and second, "We believed, and continue to believe, that it is unreasonable to require applicants to make further expenditures and continue construction efforts while their extension requests are pending." Ibid., at paragraph 4. It notes (paragraph 4, footnote 8) the holding of Channel 16 of Rhode Island, Inc. v. FCC, 440 F.2d 266, 275-276 (D.C. Cir. 1971) that "it is unfair and unreasonable to require construction while relevant FCC policy 'remains in limbo'" and TV-8, Inc., 2 FCC Rcd. 1218. 1220 (1987), that "it is unfair to expect an applicant to proceed with construction during the pendency of its appeal of staff's denial of its petition to reinstate its construction permit and to grant its extension."

52. The Designation Order also reminds that the Commission's long standing policy has been both recognized and enforced by the Court of Appeals when the Commission failed to follow it in Channel 16 of Rhode Island, Inc. v. FCC, supra, which ruled that a "permittee's uncertainty due to Commission's inaction is sufficient basis to warrant grant of extension of time to construct on equitable or waiver theory." Designation Order, paragraph 8. Applying the

Commission's policy to the facts of the present case, the Designation Order points out that the error of the Video Services Division in initially denying Rainbow's sixth extension request, an error which Press and the Staff would now have the A.L.J. repeat, was to count against Rainbow the 22 of the 33 post-appellate months during which it had an expired permit. Id.

53. In sum, under preexisting Commission policy, which the Designation Order instructs the trier to follow in this case, all but 10 months of the 32 month post-judicial review permit period preceding action on Rainbow's sixth extension request fell in the category of time during which a permittee's failure to construct must be attributed to circumstances beyond its control. Accordingly, had the Commission's original opinion contained the Section 73.3534 analysis for want of which the Court remanded the issue, it would presumably have concluded that Rainbow had satisfied the hardship requirement of Rule 63.3534(b).[12] The same controlling policy dictates favorable resolution of Issue No. 4 now on the basis that Rainbow was denied its 24-month construction period because it was precluded from constructing by circumstances beyond its control -- i.e., the pendency of court review or the lapse of its construction permit -- except for a ten month period. It was accordingly entitled to grant of the sixth request under Rule 73.3534(b) without regard to the legal effects of Judge Marcus' status quo order or to the extent of progress made at any given time. The Staff's insistence that Rainbow's failure to proceed was a business judgment, since it could have withdrawn its lawsuit, is thus simply irrelevant.

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12 It was presumably this fact which the Commission had in mind in noting in the Designation Order (paragraph 8) that it would "ordinarily . . . not designate an issue concerning extension periods," but "since we must designate this case in any event, we believe a hearing on the extension issue may assist our resolution of the matter."

54. There is no question here (as discussed in RBL's Conclusions 45-47) but that during the brief period when Rainbow held a valid construction permit, it made substantial progress within the meaning of Rule 73.3534(b)(2). Rainbow obligated itself to a 15 year site lease, constructed its transmitter building, undertook substantial engineering efforts and expended almost $500,000 in lease payments. Those factors -- i.e., substantial funds placed "at risk" and actual construction undertaken -- are indicia on the basis of which the Commission has found the "substantial progress" aspect of Section 73.3534 to be satisfied. See, Deltaville Communications, FCC 96-343, released September 12, 1996 (citing extensions in KLZZ(FM), File No. BMPH-940711JA, November 28, 1994 (applicant purchased site); KAZY(FM), File No. BMPH-941018JA (extension based on delay in processing applications)); Community Service Telecasters, Inc., 6 FCC Rcd. 6026, 6030 (1991) (funds not "at risk"); FBC, Inc., 3 FCC Rcd. 4598 (MMB 1988) (second extension warranted where permittee showed $600,000 expended). The Staff's assertion (Findings, page 70) that only "incapacity" satisfies the "substantial progress" standard for extension is thus simply contrary to law.

55. While the same considerations that establish Rainbow's compliance with Rule 73.3534(b) serve to justify waiver of Rule 73.3598, the Staff offers an independent reason why waiver is not justified, contending that it would eviscerate the rule. Findings, pages 76-77. That contention is inadmissible. In the first place, it is at odds with the Designation Order. The Court remanded the case for further consideration of Rainbow's compliance with Rule 73.3534. In addition to designating a responsive issue, the Commission gratuitously offered Rainbow the opportunity to justify a waiver of Rule 73.3598, an action it would certainly not have taken had it viewed such a waiver as imperiling the rule.

56. Moreover, the Staff's argument ignores the fact that the fundamental purpose of waivers is to prevent inequity, which was the essential message of Channel 16 of Rhode Island, supra, which the Commission cited not once but twice in the Designation Order in connection with this issue.[13] The Commission makes quite clear in the Designation Order its continued adherence to the view that equity in this context requires that all permittees receive a 24-month unencumbered construction period, which Rainbow had not yet received at the time the sixth extension request was decided.

57. While it is true that the literal reading of Rule 73.3598 insisted on by the Court of Appeals means that virtually any applicant whose grant is appealed after issuance of a construction permit will run out of time unless it builds during review, it is difficult to believe that the Staff's sense of order is so great that it would deny the extension applications of all such permittees in order to preserve the integrity of the words of the rule at the expense of its intent, which was to give all permittees the same 24-month unencumbered construction period. Adherence to the Staff's view, indeed, would almost certainly be found to elevate form over equal protection of the laws, were it ever to face constitutional scrutiny.

VI. CONCLUSION

58. Neither Press nor the Staff have offered conclusions of law which bear up to scrutiny. The record clearly shows that Polivy and the Rainbow principals had no intention to violate the ex parte rules and that the Commission staff was, in any event, apprised of Press' involvement in the proceeding. Furthermore, at all relevant times, Rainbow was financially

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13 The Staff's total failure even to mention the case deemed most relevant by the designating authority speaks volumes about its resistance to the Commission's directives on resolution of this issue.

qualified and was never required to report a loss in financing because its lender remained committed to the project. Likewise, statements made to the Commission concerning the tower litigation were accurate, sufficient and candid. Finally, Rainbow -- like all permittees -- was entitled to a full 24-months to construct its new television tower by virtue of an extension under Section 73.3534(b) of the Rules or waiver of Rule 73.3598.

Respectfully submitted,

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October 24, 1996

CERTIFICATE OF SERVICE

I, Toni R. Daluge, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP, do hereby certify that on this 24th day of October, 1996, copies of the foregoing "Joint Reply Findings of Fact and Conclusions of Law" were mailed via United States first class postage prepaid, to the following:

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